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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRANK M. REED, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the trial court's refusal to instruct over objection on a contested statutory element ever be harmless beyond a reasonable doubt under the question left open in *Connecticut v. Johnson*, U.S. , 103 S. Ct. 969 (1983)?

2. Did the trial court's refusal to permit direct evidence, cross-examination and discovery of the prime accusers' recent history of similar arsons deny Petitioner confrontation and the right to present his theory of the case under *Davis v. Alaska*, 415 U.S. 308 (1974)?

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STATUTORY PROVISIONS INVOLVED

18 U.S.C. 844(i) states:

> Whoever maliciously damages or destroys or attempts to damage or destroy, by means of an explosive . . .

18 U.S.C. 844(j) defines "explosive" as follows:

> . . . the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. 232(5) reads:

> (5) the term "explosive or incendiary device" means (1) dynamite and all other forms of high explosives, (b) any explosive bomb, grenade, missile, or similar device, and (c) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

INTRODUCTION

The Petitioner Frank M. Reed, Jr. requests a writ of certiorari issue to review the opinion of the Ninth Circuit, dated February 24, 1984. Re-Hearing and En Banc Review were denied on April 17, 1984. The opinion was amended by order of the Ninth Circuit on May 1, 1984.

OPINION BELOW

The Ninth Circuit opinion appears in Appendix II in addition to the denial of re-hearing, and order amending the opinion.

JURISDICTION

The judgment of the Ninth Circuit was entered on February 24, 1984, and a timely motion for re-hearing denied on April 17, 1984. This Petition is timely filed within ninety days and this Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner was convicted for an October 1, 1979 attempt to destroy Bobby McGee's restaurant in Anchorage, Alaska by means of an explosive under 18 U.S.C. 844. The fire did minimal damage and was extinguished. There was no evidence, however, of any explosives. Petitioner's conviction relied on the testimony of two accusers, McDaniel and Greene, who admitted doing the arson. After arrest, the accusers, in exchange for leniency, first pointed the finger at Petitioner, an Anchorage stockbroker, and testified Petitioner hired them to commit the arson.

Petitioner's defense was to show his accusers, McDaniel and Greene, had their own independent history and *modus operandi* of similar arsons. At trial Petitioner presented a detailed offer of proof to the trial court that McDaniel and Greene had been involved in four specific recent arsons of similar buildings, and profited from insurance proceeds for doing repairs. Petitioner also made an offer that Municipal arson investigative reports named McDaniel and Greene as the prime suspects in the above recent arsons.

Based on this showing, Petitioner requested discovery of the Municipal arson reports. [Tr. I-746, Doc. 182, p. 11 and Tr. II 10-11]. Petitioner also attempted to put on direct evidence and cross-examine concerning McDaniel's and Greene's prior arsons. The trial court held this evidence irrelevant, prohibited direct evidence and cross-examination in this area, and refused discovery. The trial court found this material privileged even though the Municipality admitted no ongoing investigations would be jeopardized. A written request for reconsideration was also denied by the trial court. (Attached appendix III).

Petitioner also sought to show that if anyone paid McDaniel and Greene to burn the restaurant, it was the restaurant's owners whose motive was to collect insurance. The government's case agent indicated in his reports that the owners may have burned the restaurant. Petitioner sought discovery of this exculpatory evidence and requested to present direct evidence and cross-examination in this area. The court again ruled that direct evidence, cross-examination, and discovery in this area was prohibited. [Tr. I-1870 and Tr. II-1092]. Petitioner was thus repeatedly prohibited from proving someone other than himself really committed the crime.

The Ninth Circuit affirmed on the issue of discovery, but refused to address the rights to confrontation and present evidence of the defense theory, even though fully briefed and argued on rehearing.

Petitioner also objected at trial to the refusal to instruct on a contested statutory element. Petitioner urged in argument and by written motion that the trial court give instructions on the statutory element of "explosives." 18 U.S.C. 844 requires proof of an explosive. The court, however, ignored these arguments and told the jury that a "fire" sufficed. The Ninth Circuit agreed this instruction failed to instruct on a statutory element but found this error "harmless." There was no evidence, however, of an "explosive." The damage was by fire. The failure to instruct on "explosives" thus went directly to a contested element and conflicts with *Connecticut v. Johnson*, U.S. , 103 S. Ct. 969, (1983), which holds it is never harmless to fail to instruct on a contested element.

I.

REASONS FOR GRANTING WRIT

1. THE FAILURE TO INSTRUCT OVER OBJECTION ON A CONTESTED STATUTORY ELEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT, AND CONFLICTS WITH CONNECTICUT V. JOHNSON.

In *Connecticut v. Johnson,* U.S. , 103 S. Ct. 969 (1983), this court recently viewed a major conflict in the circuit courts to determine if a failure to properly define the element of intent could be considered harmless under *Sandstrom v. Montana,* 442 U.S. 510 (1979). This court held the error could not be harmless if intent was in dispute. This court noted the major conflict this question was provoking in the circuit courts across this country. *Connecticut v. Johnson, supra* at n. 1.

Connecticut v. Johnson, supra, however, left open the question of whether errors on elements of the offense could ever be harmless. The issue raised in this petition goes directly to an area which *Connecticut v. Johnson, supra,* did not resolve for the circuit courts. This petition questions whether an instruction which totally fails to instruct on a contested *statutory* element also mandates reversal.

Since the holding in *Connecticut v. Johnson, supra,* circuit courts have split on the scope and applicability of this court's ruling. Several circuits have followed the suggestion of automatic reversal where instructional errors affect contested elements. *See United States v. Crowder,* 719 F.2d 166, 177 (6th Cir. 1983); *Engle v. Koehler,* 707 F.2d 241, 246 (6th Cir. 1983); *Conway v. Anderson,* 698 F.2d 282, 285 (6th Cir. 1983); *United States v. Johnson,* 718 F.2d 1317 (5th Cir. 1983). In *United States v. Johnson, supra,* the Fifth Circuit held the rationale of *Connecticut v. Johnson, supra,* mandated reversal since a failure to instruct on a contested statutory element (definition of security) had the improper effect of "directing the verdict." The Fifth Circuit ruled:

> Therefore, a judge may not direct a verdict of guilty no matter how conclusive the evidence. *Connecticut v. Johnson* . . . *Id.* at 1321.

The Ninth Circuit opinion in the instant case conflicts directly with all of the above circuit cases. The split between the Ninth Circuit and all other circuits illustrates the necessity to give guidance to the circuits on the applicability and scope of *Connecticut v. Johnson, supra,* to errors affecting statutory elements.

This question is of major importance to all circuit courts which constantly view instruction errors which shift or dilute the burden of proof on a statutory element. Since this question remains unresolved by *Connecticut v. Johnson, supra,* the circuit courts are left without guidance as to whether improper burden shifts on statutory elements can ever be harmless. This petition should be granted to extend the protections of *Connecticut v. Johnson, supra,* to the egregious type of error which occurred in this case.

Petitioner was convicted under 18 U.S.C. 844 for use of an "explosive." The jury, however, was never instructed on the need to find this statutory element, and told to convict based on "fire." The Appeals Court conceded the instruction was error because it failed to define an element necessary to conviction and federal jurisdiction. This error should not be considered harmless under the rationale of *Connecticut v. Johnson, supra.* The error furthermore could not be "harmless" since the instructional error went directly to a factual determination necessary to support federal jurisdiction. Absent an instruction or any evidence of an explosive this case could only be tried in state court as an arson.

The Court of Appeals held that the failure to define the element of "explosive" was error. The instruction erroneously required a finding of:

> . . . any article, substance, or combination of articles or substances capable of generating fires in a combustible material. [Tr. 2264, second trial].

The Ninth Circuit noted this overbroad instruction ignored the statutory requirement of "explosive."

> Appellant correctly points out that the instruction given here was broad enough to allow even a common match to be held an incendiary device. [Opinion at 9].

18 U.S.C. 844 REQUIRES "EXPLOSIVES"

Circuit cases unanimously agree that 18 U.S.C. 844 requires proof of an explosive. *U.S. v. Gere,* 662 F.2d 1291 (9th Cir. 1981); *U.S. v. Cutler,* 676 F.2d 1245 (9th Cir. 1982); *U.S. v. DeLuca,* 692 F.2d 1277 (9th Cir. 1982); *U.S. v. Reed,* No. 81-1246 (9th Cir., May 6, 1984); *U.S. v. Gelb,* 700 F.2d 875 (2nd Cir. 1983); *U.S. v. Hepp,* 646 F.2d 350 (2nd Cir. 1981); *U.S. v. Agrillo-Lablad,* 675 F.2d 905 (7th Cir. 1982); *U.S. v. Poulos,* 667 F.2d 939 (10th Cir. 1982); *U.S. v. Hewitt,* 663 F.2d 1381 (8th Cir. 1981). The Ninth Circuit noted in *U.S. v. Gere, supra:*

> The purpose of the section [18 USC 844(i) and (j)] was to protect buildings against the specific evil of bombing. There is no indication it was meant to overlap state arson laws. *Id.* at 1296.

Most circuit cases do not extend 18 U.S.C. 844 to gasoline arsons, since uncontained gasoline cannot explode. *U.S. v. Gere, supra; U.S. v. DeLuca, supra; U.S. v. Cutler, supra; U.S. v. Reed, supra; U.S. v. Gelb, supra.* Cases which extend §844 to gasoline have done so only where the gasoline was contained within a building and actually exploded. *U.S. v. Hepp, supra* (actual explosion from methane); *U.S. v. Agrillo-Lablad, supra* (explosion blew out windows); *U.S. v. Poulos, supra* (explosion blew up building); *U.S. v. Hewitt, supra,* (explosion in building).

Those circuits which extend §844 to gasoline without exception require *the jury* determine whether the government had proven the statutory element of "explosive." *U.S. v. Agrillo-Lablad, supra* ("explosive" question properly given to the jury); *U.S. v. Hepp, supra; U.S. v. Gelb, supra; U.S. v. Hewitt, supra.*

THE REFUSAL TO INSTRUCT AS TO A CONTESTED STATUTORY ELEMENT CAN NEVER BE HARMLESS.

The error in the instructions eliminated a statutory element. Such an error should never be harmless beyond a reasonable doubt. *Connecticut v. Johnson, supra; Chapman v. California,* 386 U.S. 18 (1967); *Schnaible v. Florida,* 405 U.S. 427 (1970); *Harrington v. California,* 395 U.S. 250 (1969). While this court left this question open in *Connecticut v. Johnson, supra,* the rationale applies *a fortiori* to errors on statutory elements.

The failure to instruct on an element is error of Constitutional dimension. Due process requires the jury always be instructed on each element of the offense. *Connecticut v. Johnson,* U.S. , 103 S. Ct. 969 (1983); *Moore v. U.S.,* 429 U.S. 20, (1976); *In Re Winship,* 397 U.S. 358, (1970).

In *Connecticut v. Johnson, supra,* this Court viewed the question of whether "instructional errors" on an element of the offense can ever be harmless. The instruction improperly diluted the burden on the element of intent. This Court found the error mandated reversal whenever intent "was in issue," and could only be harmless if the "defendant conceded the issue of intent." *Id.* at 976. This court's rationale as to the element of intent should be extended to also apply to situations where an error creates an improper burden shift on a statutory element.

This Court has repeatedly prohibited shifting or diluting the government's burden to prove statutory elements. *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Patterson v. New York,* 432 U.S. 197 (1977); *Leland v. Oregon,* 343 U.S. 790 (1952); *Hankerson v. North Carolina,* 432 U.S. 233, (1977). The error in this case was far more egregious than in the above cases due to the total elimination of an element of the statute. The rationale of *Connecticut v. Johnson* should clearly be extended to all situations where the court fails to instruct on the contested elements of the offense.

THE STATUTORY ELEMENT OF "EXPLOSIVES" WAS A JURY QUESTION

There was *no* evidence of an explosive. The minimal damage was by fire. Whether the gasoline could "explode" was an issue for the jury.

The arson was set by pouring gasoline outside the building. A one-gallon gas can was found next to the building and three 7-Up cans were found on a window ledge. The 7-Up cans were wrapped with newspaper and had their tops cut open. (Tr. II-102-108, 209). No explosives were found. No explosion occurred. The container did not break or explode. (Tr. I-284, II-104). There were no glass or breakable containers and no wicks. The government's own experts established the cans could not explode.[1]

Stephen Roberts, an explosives expert for the government, explained explosions occur when a container's internal pressure is greater than its walls. Explosions go "bang" and create noise. Roberts concluded unconfined gas placed outside of a building could not explode since fumes could not be under pressure. [Tr. I-981]. It was undisputed the 7-Up cans were outside the building, and the cans were cut open to prohibit pressure.

The government also called Ralph Cooper, an explosives expert, who concluded the 7-Up cans caused "intense heat," much like a cigarette lighter, but could not explode.[2]

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[1]The Ninth Circuit concluded that the 7-Up cans would explode with a "sharp noise or report," based on a pressure buildup. [Opinion at 6]. This conclusion is unsupported by one shred of evidence and directly contradicts all of the experts who testified the cans could not explode.

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[2]Cooper testified that:

Q. Your answer is based on the fact that these devices will cause a fire and intense flame. Correct?

A. They produce fire. That is correct.

Q. You are not saying they would explode or go "boom"?

A. Not in this – no. I wouldn't say, they would not explode in this context.

Q. I take this cigarette lighter is also a device intended to create heat and flame also?

A. Yes, absolutely. It is a device to produce flame. [Tr. I-1036].

There was no other testimony on the effects of the cans. All evidence established the 7-Up cans could not explode.

The Ninth Circuit also held the 7-Up cans could be a "molotov cocktail" under 18 U.S.C. 232(5). There was never a special verdict, however, by the jury. It is wholly speculative to conclude the jury convicted under 232(5) as opposed to merely finding a "fire" under 844.

The cans do not even fit the statutory definition of "molotov cocktails." 844 defines "explosives" to include by reference devices under 232(5), ". . . which may cause an explosion." Thus, 232(5) devices are only incorporated into 844 if they "explode."[3]

The definition found in 232(5) lists devices that "explode" such as dynamite, grenades, missiles, or bombs. The use of the term "similar device" in 232(5) refers to objects which explode.

"Molotov cocktails" under 232(5) require a breakable container, and a wick. The 7-Up cans in this case were not breakable, and there was no wick The 7-Up cans could not be the basis for a jury verdict, even if the jury reached 232(5).[4]

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[3]The Ninth Circuit in *U.S. v. Gere, supra,* held that 232(5) did not obviate the need to show an explosive:

> The cross-reference to 232(5) which appears to bring within the section "molotov cocktail" and similar devices, should not be read to broaden the section's reach as the government proposes. *Id.* at 1296.

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[4]Even the Ninth Circuit noted the implausibility of using the 7-Up cans as an "explosive" or a "molotov cocktail":

> These cans were not in fact used as weapons. They could not well have been so used, for it would have been difficult and dangerous for a person to hold such a can, ignite the paper and then successfully use or throw the can without serious harm to himself. Nothing in the record indicates that a device of this kind, although capable of causing great incendiary damage, bears a traditional indicia of a weapon, or has such possible use. [Opinion at 12].

Thus, the record is clear that there was no proof of an "explosive" or a breakable "molotov cocktail." Even if there had been such evidence, however, it was still a jury question whether the cans initiated the fire or could have exploded.

The statutory element of "explosive" was in issue. The error deprived Petitioner of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Connecticut v. Johnson, supra.*

2. THE REFUSAL TO PERMIT CROSS-EXAMINATION, PRESENTATION OF DIRECT EVIDENCE, OR DISCOVERY OF THE ACCUSERS' HISTORY OF ARSON DENIED THE MOST FUNDAMENTAL RIGHT TO PROVE WHO REALLY COMMITTED THE CRIME.

The trial court prohibited direct evidence, cross-examination, and discovery of proof that Petitioner's sole accusers, McDaniel and Greene, had a history of arson and an independent motive to burn the restaurant. The trial court further prohibited evidence that the restaurant owners, not Petitioner, paid McDaniel and Greene to burn the restaurant.

Constitutional rights to due process, cross-examination and confrontation establish that nothing is more critical to a fair trial than the right to show someone else committed the crime. *Davis v. Alaska,* 415 U.S. 308 (1983); *Brady v. Maryland,* 373 U.S. 82 (1963); *U.S. v. Butler,* 567 F.2d 885 (9th Cir. 1978); *U.S. v. Roybal,* 566 F.2d 1109 (9th Cir. 1977); *U.S. v. Cutler,* 676 F.2d 1245 (9th Cir. 1982).

As Chief Justice Burger held in *U.S. v. Nixon,* 518 U.S. 683, 713 (1974):

> We have elected to employ an adversary system of criminal justice in which the parties contested all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were founded on a partial or speculative presentation of the facts. The very integrity

> of the judicial system and public confidence in the system depends on full disclosure of all the facts within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the court that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

McDaniel's and Greene's motives to lie and shift the blame was the focal point of the entire trial. Their prior history of arsons was relevant to show their independent scheme and motive to lie under Federal Rule of Evidence 404(d). *U.S. v. Cutler*, 676 F.2d 1245 (9th Cir. 1982); *U.S. v. Vatts*, 573 F.2d 599 (9th Cir. 1978). If McDaniel and Greene had their own independent pattern of setting arsons for insurance profits, this would impeach their claim that it was Petitioner who hired them to start the fire, and would be independent proof that they set the fire for their own purposes.

The trial court was fully informed of the relevance of the prior arson. [Doc. 182 and Appendix III]. McDaniel admitted that he conspired with Greene and Helveston to burn the restaurant. Helveston, however, unbeknownst to McDaniel and Greene, cooperated with the government and secretly recorded his conversations with McDaniel and Greene. In these statements, McDaniel and Greene indicated it was really McDaniel who paid for the arson. [Tr. II-682-688]. McDaniel and Greene also indicated that McGee's restaurant hired them since McGee's restaurant was losing money. [Tr. I-459, II-682]. In one of these tape recordings, McDaniel indicated his personal motive for arsons. McDaniel was an electrician who did arson repairs with insurance proceeds. McDaniel claims on the tape recordings that he would have to renew his electrical license to "rip off the insurance company *again*." [Tr. II-454]. At trial he could not explain why he said "again."

The trial court was fully informed that McDaniel and Greene were suspects in several arsons which were contemporaneous and similar in *modus operandi* to the restaurant arson in this case. McDaniel and Greene were suspects in the Wild Cherry

Bar arson. Fire Investigator Lodwig, in a pre-trial deposition, admitted the Wild Cherry Bar arson was contemporaneous, and that the Municipality had prepared a full arson report. Greene was the bartender when the Wild Cherry burned. By coincidence McDaniel and Helveston were paid to do remodeling with the insurance proceeds. Investigator Lodwig conceded in his deposition that the file of the Municipality included lists of suspects (which included Greene), investigations into Greene, letters, photos, sketches, notes, witness interviews, a witness under hypnosis, information from an informant, vehicle license information, and a composite drawing of the suspect. [Doc. 185, p. 31-32]. These documents made it clear to the trial court that McDaniel and Greene had a *modus operandi* of burning bars for profit from remodeling. The Municipality admitted their investigation was closed and that disclosure of the file would not harm the Municipality. [Doc. 185, p. 32].

McDaniel was also involved in the arson of an apartment complex. The arson was also close in time to the case at bar. McDaniel *once again* did the electrical work on the apartment. [Doc. 182]. Investigator Lodwig from the Municipality again acknowledged that McDaniel was a suspect in the apartment arson. A Municipality investigator noted McDaniel was further suspected for the arson of an electrical company. [Doc. 182, p. 14]. McDaniel, in one of the secretly wired conversations with Helveston, referred to the above "apartment" incident on the same day he indicated his intent to "rip off the insurance company again." [Doc. 182, p. 14]. Once again the Municipality indicated they would not be prejudiced from disclosure of these files since the investigation was closed. [Doc. 185, p. 30].

The above showings were fully presented to the court in lengthy arguments as well as written requests for discovery. In a written memorandum it was argued to the trial court that these incidents were critical to cross-examination and to prove the defense theory. [Doc. 185 and Appendix III]. The above showing to the trial courts served to justify the right to present the defense theory, cross-examine, and discover evidence concerning these prior arson incidents.

The trial court also precluded Petitioner from showing that McGee's restaurant hired McDaniel and Greene to burn the restaurant to collect the insurance. Significant evidence supported this defense theory. McGee's restaurant, at the time of the arson attempt, was losing money. Both McDaniel and Greene, in taped conversations, made statements that McGee's restaurant had hired them. [Tr. II-459, 602]. Greene, in a written statement, first stated the restaurant hired him, but later crossed out this statement and wrote in Petitioner's name. [Tr. II-685]. Despite this showing, the court precluded inquiry into this area and again prohibited full discovery of relevant investigative reports prepared by the government's case agent, which explored the possibility that the restaurant burned themselves out.

The trial court reviewed the arson reports *in camera* and did not allow discovery of any of the documents. The trial court further viewed *in camera* the investigative reports by the case agent concerning the restaurant's motives to burn themselves out. The trial court excised crucial portions from the investigative reports before giving the reports to the defense. From the context of the blank spots, the edited portions appear to deal with the restaurant's economic problems. The arson reports and case agent reports were sealed for appellate review.

If the arson reports contain any reference to the prior arson schemes of McDaniel, Greene, or Billy Ray Helveston, or the case agent reports indicate evidence of McGee's Restaurant's economic problems, then these reports were exculpatory and should have been disclosed to Petitioner so that he could investigate and prove his theory of the case. *Brady v. Maryland, supra.* At a minimum, these reports should have been disclosed so that Petitioner could argue their relevance in an adversary setting. *Alderman v. United States,* 394 U.S. 165 (1969).

NINTH CIRCUIT OPINION BELOW

The Ninth Circuit opinion totally fails to address the right to cross-examination and present evidence of the defense theory of the case. The Ninth Circuit upholds the denial of discovery based on the grounds that no adequate showing was made, no specific documents requested, that the evidence was not relevant, and that even if relevant, a privilege precluded discovery. [Op. at pp. 13-14].

The Ninth Circuit is incorrect concerning specificity. Appellants in oral argument and in written motion requested specific documents limited to specific arsons, all of which name McDaniel, Greene, or Helveston as suspects in contemporaneous and similar arsons. (See Doc. 182 and Appendix III).

Furthermore, the Ninth Circuit ruling of "privilege" is inconsistent with the record and decision of the United States Supreme Court. The Municipality failed to claim a privilege for the requested documents. They conceded that there were no ongoing investigations which would be hampered if discovery were permitted. Even if the privilege existed it was outweighed by Petitioner's right to cross-examine and present his theory of the case. *Davis v. Alaska,* 415 U.S. 308 (1954) (juvenile privilege outweighed by right to cross-examination on defense theory); *U.S. v. Nixon,* 518 U.S. 683, 713 (1974) (presidential privilege outweighed by necessity of relevant evidence in a criminal trial); *Rovioro v. U.S.,* 353 U.S. 53 (1957) (confrontation outweighs confidentiality of informant); *In Re Farber,* 394 A.2d 330 (N.J. 1978) *cert. denied* 439 U.S. 670 (1978); *Brazenburg v. Hayes,* 408 U.S. 665, (1972) (press privilege falls to necessity for relevant evidence); *Alderman v. U.S.,* 394 U.S. 155 (1960) (national security interest outweighed by defendant's right to confront and discover relevant evidence).

Most importantly, the Ninth Circuit is incorrect in concluding that evidence of other suspects was not relevant. Nothing is more crucial to a fair trial than the defendant's right to prove that someone else committed the crime.

In *U.S. v. Cutler, supra,* the Ninth Circuit held that in an arson case the accuser's history of arson was relevant. The Ninth Circuit upheld the conviction only since Cutler failed to identify witnesses or establish a specific theory of relevance. Unlike *Cutler,* however, Petitioner in this case specified documents and referred to specific incidents which involve McDaniel, Greene or Helveston. The trial court was fully informed of McDaniel's and Greene's *modus operandi.* The trial court was fully informed that discovery, direct evidence, and cross-examination was crucial to the defense theory.

The refusal to permit Petitioner to prove his theory of the case denied him the right to prove who really committed the arson and why. It is crucial to a fair trial that both sides get their day in court. The failure to permit direct evidence, cross-examination or discovery prohibited Petitioner from showing that someone else committed the crime.

CONCLUSION

The refusal of the trial court to instruct over objections on a contested statutory element can never be harmless. This court should extend the rationale of *Connecticut v. Johnson, supra,* to all situations where the court fails to instruct on a statutory element. This error denied Petitioner his rights to a jury determination and eliminated the historical safeguard that the government establish proof beyond a reasonable doubt for each element of the offense.

Petitioner was denied his most fundamental right to prove his theory of the case, cross-examination of his accusers, and to discover exculpatory evidence. The trial court prohibited Petitioner from proving someone other than himself committed the crime.

DATED this 18th day of May, 1984, at Anchorage, Alaska.

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WALTER SHARE

On the Brief

APPENDIX I

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRANK M. REED, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of may, 1984, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the United States Attorney for the District of Alaska, 701 "C" Street, Box 9, Anchorage, Alaska 99513, counsel for Respondent. I further certify that all parties required to be served have been served.

WILLIAM P. BRYSON
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(907) 277-8611

Counsel for Petitioner

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	Nos. 81-1246
	)	81-1247
Plaintiff-Appellee,	)	80-1706
	)	80-1709
vs.	)	
	)	D.C. # CR 81-44 WBE-2
FRANK M. REED, JR., and	)	
DAVID L. SMITH	)	O P I N I O N
	)	
Defendants-Appellants	)	
	)	

Appeal from the United States District Court
for the Southern District of California
Honorable William B. Enright, District Judge, Presiding

Argued and Submitted: May 6, 1982
Decided:

Before: GOODWIN and POOLE, Circuit Judges, and EAST,* District Judge.

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* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

POOLE, Circuit Judge:

Appellants Frank Reed and David Smith appeal their convictions under 18 U.S.C. § 844(i) for conspiracy to damage and destroy, and maliciously damaging and destroying, property used in interstate commerce by means of an explosive or incendiary device, and for failure to register a firearm under 26 U.S.C. §5861(d). A prior indictment returned June 5, 1980, in the District of Alaska, against Reed, Smith, and three others, was dismissed because the court found "substantial irregularities" before the grand jury—"the presence of innuendos which were irrelevant to the indictment." Reed and Smith were reindicted on September 26, 1980, and their case was tried to a jury. A mistrial was declared after the jury was deadlocked. The case was then transferred to the Southern District of California for retrial. On April 6, 1981, following a second jury trial in San Diego, Reed and Smith were convicted of charges relating to the burning of Bobby McGee's restaurant in Anchorage, Alaska. (Counts I, II, III, and V.)[1] They were acquitted of attempted burning of Donovan's, another Anchorage establishment. (Counts IV and VI). This appeal was taken from their convictions on Count I, II, III and V.

Viewing the evidence in the light most favorable to the Government, the prevailing party, *Glasser v. United States,*

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[1] Count I: Conspiracy (18 U.S.C § 371) maliciously to damage and destroy by means of an explosive property known as Bobby McGee's and Donovan's in violation of 18 U.S.C. § 844(i).

Count II: On October 1, 1979, the defendants did maliciously damage and destroy, and attempted to damage and destroy, by means of an explosive, property known as Bobby McGee's restaurant. 18 U.S.C. §§ 844(i) and (j); 18 U.S.C. § 232(5).

Count III: On October 15, 1979, defendants aided and abetted the malicious damage and destruction and attempted to damage, by means of an explosive, property known as Bobby McGee's restaurant. 18 U.S.C. §§ 844(i) and (j).

Count V: On October 1, 1979, defendants possessed an unregistered firearm. 26 U.S.C. §§ 5861(d), 5845(a)(8) and (f).

315 U.S. 60, 80 (1941), the following facts were established.

In August 1979, Reed and Donal McDaniel discussed a plan to destroy Bobby McGee's, a restaurant operated by one of Reed's business competitors. In mid-September 1979, McDaniel met with Jerry Green who agreed to burn McGee's for $15,000. Green then met with David Smith, who was to do the actual burning.

On October 1, 1979, an unsuccessful attempt was made to destroy the building housing Bobby McGee's by fire. The apparent source of the fire was paper-wrapped, gasoline-filled beverage cans in the tops of which holes had been punctured. The cans had been placed around the exterior walls of the building and ignited. The damage was primarily to the exterior but some of the fire did burn through to the interior.

On October 15, 1979, a second attempt to destroy the building succeeded. The Government charged that the destruction was accomplished by pouring gasoline along the interior and exterior walls and floors of the building, and igniting it by a delay fuse.

For the reasons herein set forth, we affirm the convictions for conspiracy (Count I) and for attempted violation of § 844(i) based on the October 1 fire (Count II), but reverse the convictions for violation of § 844(i) based on the October 15 fire (Count III). We also reverse the convictions under the National Firearms Act (Count V).

1. Convictions Under Section 844(i) of the Organized Crime Control Act.

It was the Government's theory that the hole-punched cans and delay fuse constituted "explosive" or "incendiary devices" within the meaning of 18 U.S.C. § 844(i) and (j). Appellants challenge the statutory coverage.

In enacting section 844(i), Congress proscribed the malicious damage or destruction of a building by means of an "explosive." The definition of "explosive" includes an "incendiary device." In several recent cases we have had occasion to consider these terms. In *United States v. Gere,* 662 F.2d 1291 (9th Cir. 1981), the defendant was convicted under sec-

tion 844(i). A fire had been set with a delay fuse comprised of "trailers" of photocopier fluid and fluid-soaked materials. In holding that this did not constitute an explosive device, we adopted a narrow reading of the statute stating that "[t]he purpose of [section 844(i)] was to protect buildings against the specific evil of bombing. There is no indication that it was meant to overlap state arson law . . . ." *Id.* at 1296; *accord United States v. DeLuca,* 692 F.2d 1277 (9th Cir. 1982); *United States v. Cutler,* 676 F.2d 1245 (9th Cir. 1982).

Subsequent to our opinion in *Gere,* Congress amended section 844(i) so as specifically to include arson "by means of fire or an explosive." Anti-Arson Act of October 12, 1982, Pub. L. No. 97-298 § 2 (codified at 18 U.S.C. § 844(i) (1982)). The House Judiciary Committee Report specifically references *Gere* in making clear that the intent of the statute was to cover both explosive and non-explosive fires. H. Re. No. 97-678, 97th Cong., 2d Sess. 2 n.6 (1982) *reprinted in* 1982 *U.S. Code Cong. & Ad. News* 2631, 2632 n.6. Even before the amendment other federal circuits had given a broader interpretation of the statute in finding the existence of an explosive. *See e.g., United States v. Agrillo-Lablad,* 675 F.2d 905 (7th Cir.), *cert. denied,* 103 S. Ct. 66 (1982) (naphtha-soaked newspapers spread across the floor and ignited by a burning piece of paper); *United States v. Hepp,* 656 F.2d 350 (8th Cir. 1981) (delayed ignition device consisting of a cigarette inserted in a matchbox and suspended by a thread into a gasoline laden atmosphere). Nevertheless, *Gere* was controlling law in this circuit when the appellants were convicted and when they appealed, and we are bound to follow its narrower interpretation of the statute. *United States v. DeLuca,* 692 F.2d 1277, 1280 (9th Cir. 1982).

A. Fire on October 1

We conclude that the means by which the October 1 fire was set come within the statutory definition of "explosive" or "incendiary device," and that such means significantly distinguish these facts from those of *Gere.* First, section 844(j) defines "explosive," as used in section 844(i), to include "incendiary devices" that contain "any oxidizing and combustible units, or other ingredients, in such proportions, quantities,

or packaging that ignition by fire, . . . *may* cause an explosion." (emphasis added). Explosive is defined in *Webster's Third New International Dictionary* 802 (16th ed. 1971) as

> a substance that on ignition by heat, impact, friction, or detonation undergoes very rapid decomposition (as combustion) with the production of heat and the formation of more stable products (as gases) which exert tremendous pressure as they expand at the high temperature produced."

The gasoline-filled cans fit this definition. When lighted by heat and flame from the burning paper, gasoline would burn rapidly, producing heat that would cause it to change from its liquid state to a gaseous state. Because the gas was contained, the rapid expansion and combustion were likely to produce "tremendous pressure" on the container and make the popping noise typically associated with an explosion. *United States v. Poulos,* 667 F.2d 939, 941 (10th Cir. 1982) (defining explosion as a "rapid expansion of gases caused by a rapid combustion of a material, which may cause a sharp noise or report").

Second, under 18 U.S.C. § 232(5), which is incorporated into the section 844(j) definition, an explosive or incendiary device includes:

> (C) any incendiary bomb or grenade, fire bomb, or *similar device,* including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one person acting alone. (emphasis added).

The facts show that on October 1, an attempt was made to burn the building using gasoline-filled cans wrapped in paper into the tops of which holes had been punctured. This appears to be a "similar device" which very closely parallels the example set forth in the statute. In effect, it was a container whose "wick" consisted of the paper wrapping, and which could be carried or thrown by one person. The only distinction between this device and that described in the statute is that this container was not breakable. The difference is in-

significant because the punctured holes from which the expanding gas and flame would seek escape serve the same purpose as would a breakable container. The openings would allow the flammable liquid to combine with air to aid combustion and to escape the container when thrown. In fact, this device could be likened to the "Molotov cocktail" described in the statutory example. 18 U.S.C. § 232(5).

Finally, setting a fire by means of a container of gasoline ignited through an improvised wick is unlike the process used in *Gere,* which involved a flammable liquid poured in a building and ignited. Accordingly, we find that the gasoline-filled cans here, designed for ready combustion, are within the definition of explosive or incendiary device under 18 U.S.C. § 844(i). We affirm the conviction on Counts I and II based on the events of the October 1 fire.

B. Fire on October 15

The method used by the appellants in the October 15 fire, however, did not significantly differ from that in *Gere* and *United States v. Cutler.* 676 F.2d 1245 (9th Cir. 1982). Bound by the law of those cases in the presence of indistinguishable facts, we have no choice but to reverse the convictions relating to October 15 and charged in Count III.

The evidence showed that the October 15 fire was accomplished by pouring gasoline along the walls and on the floors of the building and igniting it by means of delay fuse. In both *Gere* and *Cutler* a flammable liquid was similarly poured in a building and lighted by a delayed ignition process roughly resembling a fuse. Defendants in *Gere* set the fire by "trailers" of photocopier fluid and fluid-soaked materials that were in effect "fuses." In *Cutler* approximately 20 gallons of gasoline were spread throughout the warehouse. A "trailer" of gasoline was poured extending from the warehouse into the alley, where it was ignited. Both cases essentially involved spreading flammable liquid around a room and igniting it by delayed ignition. The same was done here. Thus, following *Gere* we find no violation within the contemplation of section 844(i) in connection with the October 15 fire. *Accord United States v. Gelb,* 700 F.2d

875, 877-79 (2d Cir.) *cert. denied,* 104 St. Ct. 167 (1983) (Uncontained gasoline is not an "explosive" or "incendiary device" within the meaning of section 844(j). We reverse the convictions under Count III.

C. Jury Instructions

Appellants contend that the jury instructions defining "explosive" or "incendiary device" under section 844(i), to which they objected, constitute reversible error. The trial judge instructed the jury as follows:

> The term "explosive or incendiary device" means incendiary bomb, grenade, fire bomb, or similar device. Incendiary device is any article, substance or combination of articles or substances capable of generating fire in a combustible material.

RT 2264 (second trial). Since we found the evidence sufficient to support the convictions for the October 1 fire, the challenge to the instructions presents the issue whether the instructions as a whole were misleading or inadequate to guide the jury's determination. *United States v. Pazsint,* 703 F.2d 420, 424 (9th Cir. 1983). Plain error in the instruction is cause for reversal if it affected the "substantial rights of the defendant." *Id.*

The flammable substances involved in *Gere,* were "capable of generating fire in a combustible material" (material soaked in a flammable liquid), but were nonetheless held not to be an incendiary device under the statute. Appellants correctly point out that the instruction given here was broad enough to allow even a common match to be held an "incendiary device." But, as applied to the specific facts at issue in the October 1 burning, there was no possibility of misleading the jury. The device actually used was altogether unlike a match, and clearly within the parameters of the statute. Furthermore, the instruction was preceded by an exposition of the statutory language that identified the category of devices covered. The trial judge advised that "[t]he term 'explosive or incendiary device' means incendiary bomb, grenade, fire bomb, or similar device." RT 2264 (second trial). It is highly unlikely that the jury could have reached its finding that the device in question constituted an

explosive under the statute by a simplistic analogy to a mere match. Moreover, the jury finding was reasonable. The prejudice suggested by appellants, therefore, was not a real possibility and we find no reversible error in the instruction.

D. Vagueness

Appellants contend that 18 U.S.C. § 844(j) is overbroad and unconstitutionally vague because it fails to give notice that gasoline-filled cans could constitute an explosive or incendiary device. Since we have found the device used was very similar to the statutory description, we believe that the section provided adequate notice of the proscribed conduct. The statute is not unconstitutional as applied. *United States v. Poulos*, 667 F.2d at 941-42

II. National Firearms Act Violation

Appellants challenge their convictions on Count V under 26 U.S.C §§ 5861(d) and 5845(f), which prohibit possession of any unregistered "firearm" including a "destructive device." The unregistered firearms charged against them consisted of the paper-wrapped, gasoline-filled beverage cans, with holes punctured in the tops, which were involved in Counts I and II. Appellants argue that there was insufficient evidence for the jury to find that such cans are "destructive devices" under § 5845(f). We agree, and reverse the convictions under Count V.

A "firearm" for purposes of § 5861(d) includes a "destructive device," which is defined in § 5845(f) as:

> Any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; . . . and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which

is neither designed nor redesigned for use as a weapon.

This Circuit has passed upon the meaning of the term "destructive device" as it is used in § 5845(f). In at least two cases we have examined both the nature of the device and the intent with which it was constructed and used. In *United States v. Oba*, 448 F.2d 892, 893 (9th Cir. 1971), *cert. denied*, 405 U.S. 935 (1972) ("[S]even sticks of dynamite wrapped with copper wire and equipped with a length of black dynamite fuse, together with dynamite caps" constituted a destructive device.), we emphasized the statutory provision that such a device would include "any combination of parts either designed or intended for use in converting any device into a destructive device." In *United States v. Peterson*, 475 F.2d 806 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973), we held that a device consisting of fusee flare segments, gun powder, cotton rope and binding tape was a destructive device, and further the device could be likened to a commonly used civilian weapon of crime and violence.

Our cases thus have looked to the apparent purpose for which the device was created, and to the manner of its actual use. We do the same in this case. Following that path, we find no authority in our decided cases and no basis upon the facts presented for concluding that the paper-wrapped, gasoline-filled cans before us constituted the kind of destructive device which amounted to a firearm as described in § 5845(f).

Since the term destructive device in § 5845(f) specifically excludes "any device which is neither designed nor redesigned for use as a weapon," our inquiry is directed to a pragmatic analysis of the kind of device involved. These cans were not in fact used as weapons. They could not well have been so used, for it would have been difficult and dangerous for a person to hold such a can, ignite the paper and then successfully use or throw the can without serious harm to himself. Nothing in the record indicates that a device of this kind, although capable of causing great incendiary damage, bears the traditional indicia of a weapon, or had such a possible use.

We conclude that a reasonable jury could not have found beyond a reasonable doubt that the cans were in fact designed

or used as weapons. Accordingly, we reverse the convictions under the National Firearms Act as contained in Count V of the indictment. For this reason it becomes unnecessary to reach appellants' challenge to the constitutionality of that statute.

III. Rulings on Discovery

A. Municipal Arson Reports

Appellants sought a subpoena duces tecum to be directed to the City of Anchorage to compel production of investigative reports concerning incidents of alleged arson that occurred in the same general period as the fires at McGee's. They asserted that such information would aid their defense by indicating that certain others, named as co-defendants but not on trial, might have been contemporaneously involved in other arson activities and thus might have had independent motives to burn McGee's. The trial judge reviewed the documents *in camera,* denied the application and quashed the subpoena. Appellants challenge that ruling.

Federal Rule of Criminal Procedure 17(c) requires a showing of relevancy, admissibility, and specificity to support the issuance of a subpoena duces tecum. *United States v. Nixon,* 418 U.S. 683, 700 (1974); *United States v. Eden,* 659 F.2d 1376, 1381 (9th Cir. 1981), *cert. denied,* 455 U.S. 949 (1982). The City of Anchorage moved to quash the subpoena, arguing that relevance was not shown, that disclosure would violate the privacy rights of individuals who had cooperated with arson investigators, and that the City had an interest in protecting the confidential communications contained in the files.

The trial court did not err in quashing the subpoena. Appellants have not sufficiently demonstrated the relevance of the documents sought. Appellants have not pointed to any substantial foundation for believing that the investigative reports would furnish defensive matter, or would even suggest that the fires charged in the indictment were probably set by others. Our independent review of the documents supports the trial court's finding that the incidents described in the arson reports were different in nature from those in this

case, and give no indication that others were involved. Appellants did not request specific documents, but sought entire arson investigation files. Rule 17(c) was not intended as a discovery device, or to "allow a blind fishing expedition seeking unknown evidence." *United States v. MacKey,* 647 F.2d 898, 901 (9th Cir. 1981). Furthermore appellants did not demonstrate that the reports would have been admissible under the limitations of Federal Rule of Evidence 803(8) (B).

Enforcing or quashing Rule 17(c) subpoenas is within the discretion of the trial judge and will not be disturbed unless clearly arbitrary or without support in the record. *United States v. Nixon,* 418 U.S. at 702; *United States v. MacKey,* 647 F.2d at 901. In view of the insubstantial showing of relevance, admissibility, and specificity of the material sought, weighed against the interests of the city and individual witnesses in nondisclosure, the district court's ruling was neither arbitrary nor unsupported by the record, and will not be disturbed.

B. FBI Investigative Report

Appellants cite as additional error the trial court's denial of their pretrial and trial motions for production of Special Agent Tarrington's investigative report. The Government submitted the report to the court *in camera* pursuant to appellants' request under *Brady v. Maryland,* 373 U.S. 83 (1963), and the Jencks Act 18 U.S.C. § 3500. The trial court examined the material, excised the irrelevant portions, turned some over to the defendants, and resealed the remainder for appellate review. Appellants wanted Tarrington's investigations to determine whether they showed other persons might have set the fires or contained other evidence of an exculpatory nature. They have asked the court to review the documents to determine the propriety of the partial excision.

We have reviewed Agent Tarrington's investigative report in full, and find that the trial court exercised proper discretion in examining these documents *in camera* and in excising the portions irrelevant to the Agent's direct testimony. 18 U.S.C. § 3500(c). The trial judge in fact liberally allowed the defense access to these materials. RT 1050-51 (first trial). The

excised portions contain no material exculpatory evidence and are either completely speculative or irrelevant to these proceedings. Thus we find no error in the trial court's limitations on discovery of Agency Tarrington's report.

IV. Grand Jury Proceedings

Because of substantial irregularities before the grand jury, the trial court dismissed the first indictment. Specifically, the prosecutor made statements irrelevant to the indictment, tending to link appellants to gambling, narcotics, and organized crime, and implying that a grand jury indictment might be necessary to persuade them to cooperate with authorities. Appellants argue that the dismissal should have been with prejudice. Additionally, appellant Smith argues that the second indictment should have been dismissed as to him because of erroneous and prejudicial statements made in reponse to a grand juror's question. We find both arguments unpersuasive.

A. First Indictment

Appellants cite no authority supporting their argument for dismissal of the first indictment with prejudice. Our recent cases indicate a presumption that dismissal of an indictment for prosecutorial misconduct does not bar reindictment. *See United States v. Brooklier*, 685 F.2d 1208, 1215 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1194-95 (1983) (second indictment adding a new count allowed following dismissal of the first indictment because of grand jury voting irregularities; *United States v. Trass*, 644 F.2d 791, 792-97 (9th Cir. 1981) (the district court's instruction to the government to present the case for the third time to the grand jury, following two dismissals without prejudice, reversed as unwarranted judicial effort to enforce a particularized standard of prosecutorial conduct).

Appellants argue that dismissal with prejudice is required because multiple prosecutions may be used oppressively and that the extensive media coverage of the case, as well as coverage of the details of the first dismissal, created a danger of misuse. Although misconduct sufficiently gross as to persuade a trial court to dismiss an indictment, followed by representation of the case and successive new indictments, could

become oppressive, such did not in fact occur, and appellant's right to a fair trial was not prejudiced by the reindictment. Undocumented speculation regarding possible prejudice as a result of reindictment does not warrant reversing a conviction on appeal.

Nor does heavy trial publicity necessarily call for dismissing an indictment. In *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), this court reversed a conviction and ordered new trial because of pretrial publicity, but refused to dismiss the indictment. The court stated that the pretrial publicity issue pertains to the ultimate fairness of the trial, not to the conduct of the government in promoting the prosecution.

> If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence.

Id. at 634; *see also United States v. Y. Hata & Co., Ltd.*, 535 F.2d 508, 512 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976).

We note that the publicity involved took place in Alaska, but the case was actually and eventually tried in San Diego, far removed from the original area of interest. Hence, if the petit jury eventually selected was impartial, the pretrial publicity did not negative the fairness of the trial. Appellants do not challenge the impartiality of the trial jury. Therefore, there is no basis for holding the pretrial publicity to have worked prejudice upon the verdict. The Government was properly permitted to obtain a second indictment.

B. Dismissal of the Second Indictment

Appellant Smith argues that the second indictment should be dismissed as to him because of incorrect and prejudicial statements made by a witness during the grand jury proceedings. In response to a grand juror question, Agent Tarrington stated that Smith was currently in jail and that he had a felony conviction for violation of probation. Smith's violation was not a felony. The prosecutor did not caution the grand jury regarding the use of these statements.

"Dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way . . . ." *United States v. Thompson,* 576 F.2d 784, 786 (9th Cir. 1978); *United States v. Samango,* 607 F.2d 877, 882 (9th Cir. 1979) (quoting *Thompson).* The prosecution must have "significantly infringed upon the ability of the grand jury to exercise its independent judgment." *United States v. Cederquist,* 641 F.2d 1347, 1353 (9th Cir. 1981). That is not the case here. The grand jury could properly inquire about Smith's criminal record and was not bound by procedural or evidentiary rules. *See United States v. Calandra,* 414 U.S. 338, 343 (1974). The statement that Smith's probation violation conviction was a felony conviction was in fact erroneous, but does not seem harmful.

The statements do not constitute flagrant prosecutorial misconduct which significantly infringed the ability of the grand jury to exercise its independent judgment. Thus, dismissal of the second indictment was not called for and the denial of such motion to dismiss was a proper exercise of the trial court's discretion. *See United States v. Vargas-Rios,* 607 F.2d 831, 835 (9th Cir. 1979).

V. Jury Instructions

A. Instruction on Punishment

Appellants also contend that the trial court erred in instructing the jury on weighing the credibility of testimony given by Government witness Jerry Green. Green had entered into a plea bargain with the prosecution whereby he would avoid incarceration in exchange for cooperation and testimony against Reed and Smith. On Friday, March 6, 1981, the court gave the following instruction:

> The testimony of a witness who provides evidence against a defendant for pay, or for immunity from prosecution or punishment, or personal advantage or for vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether such witness' testimony has been affected by interest or by prejudice against the defendant.

RT 2278-79 (second trial). On the following Monday the court instructed the jury that the

> punishment provided by law for the offenses charged in the indictment are matters exclusively within the province of the court. It should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

RT 2293 (second trial). Appellants argue that the instruction that punishment should not be used "in any way" conflicted with the instruction providing that the jury should consider the self-interest of a witness given immunity from incarceration.

The argument fails. The two instructions cover different subject matter. The credibility instruction related to the witness' credibility—the jury was told that it might consider any influence of the plea bargain in deciding whether Green spoke the truth. The later instruction related only to punishment the *defendant* might receive. It told the jury that whether or to what extent a defendant might suffer punishment was not to be a factor in determining his guilt or innocence. "The adequacy of jury instructions is determined by examining the instructions as a whole." *United States v. Long*, 706 F.2d 1044, 1055 (9th Cir. 1983). The trial court did not err.

B. Instruction on Prior Inconsistent Statements

Appellant Reed complains of error in the trial court's instruction to the jury that prior inconsistent statements of a witness are only admissible to impeach credibility, and cannot be used substantively unless made under oath. Reed argues that prior inconsistent statements by his coconspirators should have been considered as substantive evidence by the jury.

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that a statement offered against a party is not hearsay and may be used for its substantive value if made "by a coconspirator of a party during the course of and in furtherance of the conspiracy." The statements which Reed contends should have been admitted for their substantive content were

made after termination of the conspiracy for which he was convicted. They occurred during an attempt by his erstwhile coconspirators to burn Donovan's on December 31, 1979. Reed was acquitted of charges that he was involved in this incident. Thus, the statements were not made during the course of or in furtherance of the conspiracy to burn McGee's, and were not sanctioned as nonhearsay. Fed. R. Evid. 801(d)(2)(E). Neither were the statements admissible for their substantive content under the hearsay exception for statements against penal interest. For this exception to apply, the declarant must be unavailable as a witness at trial. Fed. R. Evid. 804(b)(3). Here both declarants were present and testified at trial.

VI. Violation of Fed. R. Evid. 801(d)(2)(E)

Appellant Smith argues that the court violated Federal Rule of Evidence 801(d)(2)(E) in allowing a witness to testify concerning a statement allegedly made by Smith. This contention is meritless. "[A] defendant's own statements are admissions wholly apart from the coconspirator exception and as such are admissible as nonhearsay." *United States v. Perez,* 658 F.2d 654, 659 (9th Cir. 1981).

Testimony of statements by other coconspirators was also admitted by the trial court. Smith objects to the admissibility of these statements under the coconspirator exception arguing that the prosecution had not presented a proper foundation for the evidence. This argument is also without merit. Conspirator statements may be admitted conditionally "subject to a later motion to strike if the prosecution fails to establish the required foundation." *United States v. Watkins,* 600 F.2d 201, 204 (9th Cir.), *cert. denied,* 444 U.S. 871 (1979). A proper foundation was laid, and the evidence against the defendants appears sufficient to justify their conviction of the conspiracy. Thus, the statements were properly admitted.

VII. Vicarious Liability

Finally, appellant Reed contends that he cannot be held vicariously liable for those who did the actual burning because he only agreed to have McGee's "burnt," but did not agree

to the use of "explosives." Reed need not have known the precise method employed to be vicariously liable for the acts that resulted in accomplishing the conspiratorial goal of detroying McGee's. The law is clear that a defendant may be convicted of the substantive acts of his coconspirators, as long as those acts are "committed pursuant to and in furtherance of the conspiracy." *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979).

Accordingly, the judgment of the district court is AFFIRMED on Counts I and II, and REVERSED on Counts III and V.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	Nos. 81-1246
	)	81-1247
Plaintiff-Appellee,	)	80-1706
	)	80-1709
vs.	)	
	)	D.C. #CR 81-44 WBE-2
FRANK M. REED, JR., and	)	
DAVID L. SMITH,	)	ORDER
	)	
Defendants-Appellants.	)	
	)	

Before: GOODWIN and POOLE, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	Nos. 81-1246
	)	81-1247
Plaintiff-Appellee,	)	80-1706
	)	80-1709
vs.	)	
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FRANK M. REED, JR., and	)	
DAVID L. SMITH,	)	ORDER
	)	
Defendants-Appellants.	)	
	)	

Before: GOODWIN and POOLE, Circuit Judges, and EAST,* District Judge.

Amend the opinion by deleting on page 1067, first column, the last sentence in the first full paragraph beginning with "Plain error" through the citation "*Id.*" Insert the following sentence:

> Error in the instructions requires reversal only if there is a "reasonable possibility that the error materially affected the verdict." *United States v. Herbert,* 698 F.2d 981, 986 (9th Cir. 1983).

On page 1067, second column, delete the last sentence of the paragraph ending before subheading "D." Insert the following sentence:

> We see no real possibility that the jury verdict was materially affected; therefore, we do not find reversible error in the instruction.

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A80-60 Cr.
	)	
FRANK M. REED, JR., DONAL L. McDANIEL, DAVID L. SMITH a/k/a "Smitty," DON E. BURK, and JERRY BERNARD GREENE,	)	
	)	
Defendants.	)	

OBJECTION TO TRIAL COURT'S EVIDENTIARY RULING AND RENEWED OFFER OF PROOF

Defendant Frank Reed, Jr. objects to the ruling of the trial court which prohibits counsel from inquiring into Lodwig's investigation of other arsons related to this case. Specifically, this court has precluded Defendant from going into the specifics of fires involving the Wild Cherry Bar, the burning of Moby Dick's Bar, two fires at the Kit Kat Club, P.J.'s Bar and the burning of an apartment complex owned by Jean Pope and John Mercier, which involves McDaniel.

It is Defendant's position that the ruling of the trial court violates Defendant's basic due process right to present his own defense theory of the case in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Defendant also would argue that equal protection and constitutional rights to cross-examination, confrontation, compulsory process and exculpatory evidence are equally violated, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, in so precluding counsel's line of inquiry.

A defendant is entitled to present his theory of the case and is not limited to what is relevant to the *government's* concept of conspiracy.

Defendant has moved for discovery of the arson reports in several pretrial discovery motions. All these discovery motions were denied. Defendant has further urged the court to grant early discovery so that we could investigate these other incidents and that request was denied. Defendant tried voluntarily obtaining the reports and information that the City arson unit has on these related arsons and was told to get subpoenas. Defendant served subpoenas on the City and these subpoenas were opposed and eventually quashed by the court. Defendant is now trying to inquire into these areas.

Given the above background, it is obvious that an offer of proof must be limited, since we have been denied discovery of reports or access to the information the government has. Nevertheless, it is clear, as stated in our motion in support of the subpoena for arson reports, that there is a substantial showing that these incidents involve relevant evidence to the defense theory that somebody besides Defendant Reed committed the act charged.

Lodwig's investigations of these related arsons link McDaniel and Greene to a mysterious history of arson fires. The area which we wish to inquire into shows a pattern, modus operandi or habit of both McDaniel and Greene to burn structures for personal gains, personal motives, motives to burn out competition and insurance schemes where McDaniel picks up the electrical contract and gains the insurance benefits following a fire. The above evidence thus independently establishes that McDaniel was acting with people other than the Defendant, or on his own, and furthermore, is relevant to McDaniel and Greene's mental state and knowledge of the existence of these schemes and knowledge which would assist their fabrication in this case. The above requested evidence would furthermore establish that somebody other than the Defendant is involved in a bar war with bars essentially burning themselves out, and that would further show that people other than the Defendant were responsible for the acts charged in this case.

The evidence would furthermore show that Inspector Lodwig, a prime witness for the government, knew of these arson investigations and knew of the relationships of these other arson investigations to this case but failed to investigate further. Such a showing would be relevant to that witness's motive to testify, as well as relevant to his reasons for failing to continue investigations in this case concerning suspects other than the Defendant.

As noted in Defendant's motion for his arson reports, the burning of the Wild Cherry is close in time to the burning of McGee's and Donovan's and Lodwig in his deposition discusses the burning, notes Jerry Greene was a bartender in the Wild Cherry when it was burned, suspects that it was an arson fire, first heard the name Jerry Greene in relationship to the Wild Cherry arson fire and mentioned that Greene's name was in an investigation report on that fire. The Wild Cherry ties in further to McDaniel and Greene since Helveston indicates that both Helveston and McDaniel picked up the electrical contract to do the construction work on the Wild Cherry. This shows a modus operandi of insurance fraud schemes, since the government's own witness, McDaniel, admitted on the stand that he has stated that in this case he had the modus operandi, once again, of intending to "rip the insurance company off *again.*" [Emphasis added]. The suggestion of the word "again" clearly makes the entire circumstances of the Wild Cherry Bar and all investigations of them relevant to this case, to show McDaniel was acting on his own.

Similarly, Inspector Lodwig admitted that McDaniel was a suspect in the burning of a 12-plex apartment building. The building was burnt by arson and an investigation was done by Lodwig, naming McDaniel as an arson suspect. McDaniel had the electrical contract on the 12-plex and was involved in a dispute or contract difficulty with the owners of the building. As counsel has stated in court, he believes that further inquiry in this area and discovery of the report would indicate that McDaniel made incriminating statements concerning his intent to burn that apartment building. Lodwig has suspected McDaniel of another fire concerning an electrical company.

Significantly, in the government's tape recorded conversation, Tape 9A, p. 36, Helveston and McDaniel discuss the apartment deal and its repercussions. Thus, this shows that McDaniel is once again talking of burnings, at the same time he is planning these burnings. (*See* facts stated in arson report subpoena request.)

P.J.'s, similarly, received numerous bomb threats, according to Lodwig's testimony, over the arson hot line just about the time that McGee's and the Donovan's incidents occurred. In the government's own transcripts, there is substantial discussion about the owner of P.J.'s being hit by a car and questions as to whether or not that involved a possible bar war or somebody burning out competition. The government's own witness, Greene, talks about the possibility that somebody other than Defendant is trying to burn out all the bars and specifically names Moby Dick's, thus linking the Moby Dick's incident once again to this case. Greene indicates that he thinks someone big is having half of them burnt, after specifically denying that Reed was involved.

The Kit Kat Club and Moby Dick's, similarly, are fires of Anchorage bars recent enough in time to be relevant to this case. The above incidents show possible bar wars involving those other than the Defendant and furthermore would show evidence that would once again link McDaniel and Greene into possible independent schemes to burn bars to avoid competition, and for insurance motives. These incidents are relevant to all of the above stated purposes and inquiry into these areas would show that bars were burnt in a similar manner for similar motives, all by arson, and all within a relatively short period of time and all with bars that directly competed with McDaniel's bar or Bobby McGee's bar. Defendant should be permitted to ask questions concerning all the specifics of these fires and all investigations concerning the above arson fires.

The government has indicated in its opening argument that McDaniel was innocently minding his own business when Burk and Reed approached him to do the fires. The above information directly contradicts this and directly establishes by independent proof McDaniel's own history, modus operandi and

scheme to act independently for personal gain, insurance benefits and schemes and further shows evidence that people other than Defendant Reed had been burning bars to eliminate competition. Full inquiry into these areas should be permitted.

Defendant should be permitted to inquire into all of the above areas and would further incorporate all memoranda by the Defendant and the City of Anchorage regarding subpoenaed arson reports as part of this offer of proof.

DATED at Anchorage, Alaska this 3rd day of December 1980.

BIRCH, HORTON,
BITTNER, MONROE
PESTINGER &
ANDERSON

Attorneys for
Defendant Reed

By _____
William P. Bryson